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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

9 PETER SANDBACK,)
10 Plaintiff,) No. CV-05-0336-AAM
11 v.)) ORDER GRANTING DEFENDANT'S
12 JO ANNE B. BARNHART,)) MOTION FOR SUMMARY JUDGMENT
13 Commissioner of Social)
14 Security,)
Defendant.)
)

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16 BEFORE THE COURT are Plaintiff's Motion for Summary Judgment
17 (Ct. Rec. 11) and Defendant's Motion for Summary Judgment (Ct.
18 Rec. 15), noted for hearing without oral argument on May 15, 2006
19 (Ct. Rec. 10). Plaintiff Peter Sandback ("Plaintiff") filed a
20 reply brief on May 15, 2006. (Ct. Rec. 17). Attorney Maureen J.
21 Rosette represents Plaintiff; Special Assistant United States
22 Attorney David R. Johnson represents the Commissioner of Social
23 Security ("Commissioner"). After reviewing the administrative
24 record and the briefs filed by the parties, the Court **GRANTS**
25 Defendant's Motion for Summary Judgment (Ct. Rec. 15) and **DENIES**
26 Plaintiff's Motion for Summary Judgment (Ct. Rec. 11).

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JURISDICTION

By application dated October 11, 2002, Plaintiff protectively filed an application for Social Security disability benefits. (Administrative Record ("AR") 153-155). Plaintiff also filed for benefits previously in September 1981, May 1998, and July 2001. These applications were denied and Plaintiff did not appeal their denial. The Administrative Law Judge ("ALJ") assigned to this case expressly declined to reopen the prior determinations. (AR 31-32).

Plaintiff's October 11, 2002 application was denied initially (AR 127-130) and on reconsideration (AR 133-135). On October 6, 2004, Plaintiff appeared before ALJ Mary Reed, at which time testimony was taken from Plaintiff and vocational expert, Fred Cutler. (AR 606-648). On December 14, 2004, the ALJ issued a decision finding that Plaintiff was not disabled. (AR 31-43). The Appeals Council denied a request for review on September 15, 2002. (AR 13-16). Therefore, the ALJ's decision became the final decision of the Commissioner, which is appealable to the district court pursuant to 42 U.S.C. § 405(g). Plaintiff filed this action for judicial review pursuant to 42 U.S.C. § 405(g) on October 26, 2005. (Ct. Rec. 2).

STATEMENT OF FACTS

The facts have been presented in the administrative hearing transcript, the ALJ's decision, the briefs of both Plaintiff and the Commissioner and will only be summarized here.

Plaintiff was 57 years old on the date of the ALJ's decision. (AR 153). His educational background includes A GED, vocational training in carpentry and fisheries, and a year and a half of

1 college. He has no past relevant work. At the hearing, Plaintiff
2 claimed the last time he worked was at a department store for
3 approximately six weeks vacuuming. Plaintiff alleges disability
4 since November 10, 1976 due to knee and back injuries. (AR 160).

5 **SEQUENTIAL EVALUATION PROCESS**

6 The Social Security Act (the "Act") defines "disability" as
7 the "inability to engage in any substantial gainful activity by
8 reason of any medically determinable physical or mental impairment
9 which can be expected to result in death or which has lasted or
10 can be expected to last for a continuous period of not less than
11 twelve months." 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). The
12 Act also provides that a Plaintiff shall be determined to be under
13 a disability only if any impairments are of such severity that a
14 Plaintiff is not only unable to do previous work but cannot,
15 considering Plaintiff's age, education and work experiences,
16 engage in any other substantial gainful work which exists in the
17 national economy. 42 U.S.C. §§ 423(d)(2)(A), 1382c(a)(3)(B).
18 Thus, the definition of disability consists of both medical and
19 vocational components. *Edlund v. Massanari*, 253 F.3d 1152, 1156
20 (9th Cir. 2001).

21 The Commissioner has established a five-step sequential
22 evaluation process for determining whether a person is disabled.
23 20 C.F.R. §§ 404.1520, 416.920. Step one determines if the person
24 is engaged in substantial gainful activities. If so, benefits are
25 denied. 20 C.F.R. §§ 404.1520(a)(4)(i), 416.920(a)(4)(i). If
26 not, the decision maker proceeds to step two, which determines
27 whether Plaintiff has a medically severe impairment or combination
28 of impairments. 20 C.F.R. §§ 404.1520(a)(4)(ii),

1 416.920(a)(4)(ii).

2 If Plaintiff does not have a severe impairment or combination
3 of impairments, the disability claim is denied. If the impairment
4 is severe, the evaluation proceeds to the third step, which
5 compares Plaintiff's impairment with a number of listed
6 impairments acknowledged by the Commissioner to be so severe as to
7 preclude substantial gainful activity. 20 C.F.R. §§
8 404.1520(a)(4)(ii), 416.920(a)(4)(ii); 20 C.F.R. § 404 Subpt. P
9 App. 1. If the impairment meets or equals one of the listed
10 impairments, Plaintiff is conclusively presumed to be disabled.
11 If the impairment is not one conclusively presumed to be
12 disabling, the evaluation proceeds to the fourth step, which
13 determines whether the impairment prevents Plaintiff from
14 performing work which was performed in the past. If a Plaintiff
15 is able to perform previous work, that Plaintiff is deemed not
16 disabled. 20 C.F.R. §§ 404.1520(a)(4)(iv), 416.920(a)(4)(iv).
17 At this step, Plaintiff's residual functional capacity ("RFC")
18 assessment is considered. If Plaintiff cannot perform this work,
19 the fifth and final step in the process determines whether
20 Plaintiff is able to perform other work in the national economy in
21 view of Plaintiff's residual functional capacity, age, education
22 and past work experience. 20 C.F.R. §§ 404.1520(a)(4)(v),
23 416.920(a)(4)(v); *Bowen v. Yuckert*, 482 U.S. 137 (1987).

24 The initial burden of proof rests upon Plaintiff to establish
25 a *prima facie* case of entitlement to disability benefits.
26 *Rhinehart v. Finch*, 438 F.2d 920, 921 (9th Cir. 1971); *Meanel v.*
27 *Apfel*, 172 F.3d 1111, 1113 (9th Cir. 1999). The initial burden is
28 met once Plaintiff establishes that a physical or mental

1 impairment prevents the performance of previous work. The burden
2 then shifts, at step five, to the Commissioner to show that (1)
3 Plaintiff can perform other substantial gainful activity and (2) a
4 "significant number of jobs exist in the national economy" which
5 Plaintiff can perform. *Kail v. Heckler*, 722 F.2d 1496, 1498 (9th
6 Cir. 1984).

7 **STANDARD OF REVIEW**

8 Congress has provided a limited scope of judicial review of a
9 Commissioner's decision. 42 U.S.C. § 405(g). A Court must uphold
10 the Commissioner's decision, made through an ALJ, when the
11 determination is not based on legal error and is supported by
12 substantial evidence. *See Jones v. Heckler*, 760 F.2d 993, 995
13 (9th Cir. 1985); *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir.
14 1999). "The [Commissioner's] determination that a plaintiff is
15 not disabled will be upheld if the findings of fact are supported
16 by substantial evidence." *Delgado v. Heckler*, 722 F.2d 570, 572
17 (9th Cir. 1983) (citing 42 U.S.C. § 405(g)). Substantial evidence
18 is more than a mere scintilla, *Sorenson v. Weinberger*, 514 F.2d
19 1112, 1119 n. 10 (9th Cir. 1975), but less than a preponderance.
20 *McAllister v. Sullivan*, 888 F.2d 599, 601-602 (9th Cir. 1989);
21 *Desrosiers v. Secretary of Health and Human Services*, 846 F.2d
22 573, 576 (9th Cir. 1988). Substantial evidence "means such
23 evidence as a reasonable mind might accept as adequate to support
24 a conclusion." *Richardson v. Perales*, 402 U.S. 389, 401 (1971)
25 (citations omitted). "[S]uch inferences and conclusions as the
26 [Commissioner] may reasonably draw from the evidence" will also be
27 upheld. *Mark v. Celebrenze*, 348 F.2d 289, 293 (9th Cir. 1965).
28 On review, the Court considers the record as a whole, not just the

1 evidence supporting the decision of the Commissioner. *Weetman v.*
2 *Sullivan*, 877 F.2d 20, 22 (9th Cir. 1989) (quoting *Kornock v.*
3 *Harris*, 648 F.2d 525, 526 (9th Cir. 1980)).

4 It is the role of the trier of fact, not this Court, to
5 resolve conflicts in evidence. *Richardson*, 402 U.S. at 400. If
6 evidence supports more than one rational interpretation, the Court
7 may not substitute its judgment for that of the Commissioner.

8 *Tackett*, 180 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579
9 (9th Cir. 1984). Nevertheless, a decision supported by
10 substantial evidence will still be set aside if the proper legal
11 standards were not applied in weighing the evidence and making the
12 decision. *Brawner v. Secretary of Health and Human Services*, 839
13 F.2d 432, 433 (9th Cir. 1987). Thus, if there is substantial
14 evidence to support the administrative findings, or if there is
15 conflicting evidence that will support a finding of either
16 disability or nondisability, the finding of the Commissioner is
17 conclusive. *Sprague v. Bowen*, 812 F.2d 1226, 1229-1230 (9th Cir.
18 1987).

19 **ALJ'S FINDINGS**

20 The ALJ found at step one that Plaintiff has not engaged in
21 substantial gainful activity during any time at issue. (AR 33).
22 At step two, the ALJ found that the medical evidence established
23 the Plaintiff suffered from severe musculoskeletal impairments,
24 including a right knee injury, degenerative disc disease in his
25 back, and coronary artery disease characterized by left shoulder
26 pain. Finding Plaintiff suffered from only mild depression, the
27 ALJ concluded the record did not establish the Plaintiff suffered
28 from a severe mental impairment. Though Plaintiff has impairments

1 considered severe, the ALJ concluded that he does not have an
2 impairment or combination of impairments listed in or medically
3 equal to one of the Listings impairments. (AR 39, 42).

4 After finding the Plaintiff's testimony regarding his
5 limitations not credible (AR 38, 42), the ALJ concluded that
6 Plaintiff has the RFC to perform work requiring no more than
7 medium exertion. (AR 40). She specifically found that plaintiff's
8 impairments limit him to work that does not require lifting more
9 than 25 pounds frequently or more than 50 pounds occasionally, or
10 more than occasionally climbing, stooping, kneeling, crouching or
11 crawling. The ALJ observed that Plaintiff had no past relevant
12 work experience and proceeded to deal with the Commissioner's
13 burden at step five to show that there are jobs existing in
14 significant numbers in the national economy which Plaintiff can
15 perform, consistent with his medically determinable impairments,
16 functional limitations, age and education. In response to the
17 ALJ's hypothetical question the vocational expert testified that a
18 person having the hypothesized conditions could perform such jobs
19 as a cleaner, machine feeder or offbearer, unskilled
20 inspector/sorter, and metal plating, and that a significant number
21 of these jobs existed in the state and national economy.
22 Accordingly, the ALJ determined at step five of the sequential
23 evaluation process that Plaintiff was not disabled within the
24 meaning of the Social Security Act. (AR 41-42).

25 **ISSUES**

26 Plaintiff contends that the Commissioner erred as a matter of
27 law. Specifically, he argues that (1) the ALJ erred by concluding
28 his mental impairments were not severe at step two of the

1 sequential evaluation process; and (2) the ALJ's residual
2 functional capacity determination was not properly supported.
3 Plaintiff challenges the determination that he can perform medium
4 duty work.

5 The Commissioner opposes the Plaintiff's motion and requests
6 the ALJ's decision be affirmed. (Ct. Rec. 16 at 7).

7 **DISCUSSION**

8 **A. Relevant Time Period**

9 SSI benefits are authorized by Title XVI of the Social
10 Security Act. SSI benefits are not payable for the month in which
11 the application was filed or for any months prior to the month in
12 which the application for such benefits is filed. 20 C.F.R. §§
13 416.200, 416.330(a), 416.335. Accordingly, although Plaintiff has
14 alleged his disability began in the 1970s, the earliest month
15 Plaintiff could receive SSI benefits based on his October 2002
16 application is November 2002, no matter how long he has actually
17 been disabled. *See Brown v. Apfel*, 192 F.3d 492, 495 n. 1 (5th
18 Cir.1999); see also 20 C.F.R. § 416.335. The ALJ did not reopen
19 Plaintiff's earlier applications. Consequently the relevant time
20 period for the Court's consideration of plaintiff's claim for
21 Title XVI benefits would begin in November 2002.

22 **B. Step Two Determination Re: Mental Impairment**

23 Plaintiff contends that the ALJ erred by finding that her
24 mental impairment was not severe in the second step of the
25 disability analysis. Specifically, plaintiff argues the ALJ should
26 have considered doctor's opinions rendered in 1987 and 1990 and
27 given more weight to the Dr. Deborah Brown's psychological
28 evaluation and report. An impairment or combination of

1 impairments is not severe if it does not significantly limit one's
2 physical or mental ability to do basic work activities. See 20
3 C.F.R. § 404.1521; 416.920(c)). In other words, an impairment is
4 severe if it has more than a minimal effect on an individual's
5 ability to do basic work activities. *Smolen v. Chater*, 80 F.3d
6 1272, 1290 (9th Cir. 1996).

7 Substantial evidence supports the ALJ's conclusion that
8 Plaintiff's depression was not severe. The only medical records
9 documenting Plaintiff's depression near the relevant time period
10 are Dr. Christopher Goodwin's diagnosis in August 2004 (AR 570)
11 and his subsequent referral to Dr. Debra Brown for psychological
12 evaluation in September 2004 (AR 579-582). The ALJ's opinion
13 evidences a careful consideration of these records. As noted by
14 the ALJ, Dr. Brown specifically opined that Plaintiff was "mildly
15 depressed" and stated in her narrative that she did "not see any
16 psychological reason why Mr. Sandback cannot work." (AR 586). The
17 ALJ also noted that Dr. Brown's conclusion of mild impairment was
18 inconsistent with some of the boxes she checked on the public
19 assistance form (AR 581), which would suggest significant work-
20 related limitations. (AR 37). Dr. Brown even admitted that she
21 did not have Plaintiff's medical record and it was "impossible"
22 for her to know whether Plaintiff's descriptions to her were
23 accurate. (AR 585). Notably, the ALJ found the Plaintiff not
24 credible, a finding which is uncontested here. Considering these
25 facts, the ALJ was justified in according these check box
26 conclusions no weight in light of their inconsistency with her own
27 narrative report and the Plaintiff's activities of daily living.
28 See *Crane v. Shalala*, 76 F.3d 251, 253 (9th Cir. 1996) (explaining

1 that an ALJ may permissibly reject check-off reports that do not
2 contain any explanation of the bases of their conclusions).

3 A careful review of the record reveals substantial evidence
4 supports the finding of the ALJ at Step 2 that Plaintiff's
5 depression was not a severe impairment within the meaning of the
6 regulations during the relevant time period. *See Tackett v. Apfel*,
7 180 F.3d 1094, 1098 (9th Cir. 1999) (holding that, if the evidence
8 reasonably supports a social security decision, the court must
9 uphold the decision and may not substitute its judgment for the
10 agency's).

11 **C. Residual Functional Capacity (RFC)**

12 Plaintiff also disputes the ALJ's determination that
13 Plaintiff retains the residual functional capacity to perform the
14 exertional demands of medium work. Plaintiff maintains this
15 determination is inconsistent with the opinions of Dr. Brewster,
16 Dr. Bagby, and Dr. Goodwin.

17 In 2001, while Plaintiff was waiting to schedule arthroscopic
18 knee surgery, Dr. Robert Brewster, M.D., an orthopaedic surgeon,
19 evaluated Plaintiff and indicated the Plaintiff could perform only
20 sedentary work activities. (AR 238). However, following the
21 arthroscopic procedure, as the ALJ noted, Dr. Larry Lamb, M.D.
22 opined that the Plaintiff had a "fully functional knee" and that
23 he "cannot find cause for recommendation of physical restrictions
24 related to his employability." (AR 465-466). Dr. Glenn Bonacum,
25 M.D. stated on August 14, 2003 that the Plaintiff "does not have a
26 significant right knee problem" and he believed he could return to
27 work. (AR 476). Dr. Brewster's pre-surgical opinion which
28 contradicts later post-operative opinions, does not provide a

1 basis for additional limitation in Plaintiff's residual functional
2 capacity assessment.

3 Plaintiff contends that the ALJ improperly rejected the
4 findings of examining physician, Dr. G.W. Bagby, M.D., and thus
5 erred in her RFC assessment by ignoring Dr. Bagby's assessment of
6 severe limitation due to Plaintiff's back problems. In January
7 2003, Dr. Bagby concluded that Plaintiff could be a surgical
8 candidate for his back condition and stated that Plaintiff's
9 "impairment rating is severe impairment and severely limited for
10 at least four months" and that after surgery he would be unable to
11 work for approximately one year. (AR 325-326). As noted by the
12 ALJ, Plaintiff was thereafter referred to Dr. John Demakas, M.D.,
13 who, after a bone scan, opined that there was no evidence of any
14 facet inflammation and that, therefore, he did "not see any
15 indication for surgical intervention as this point." (AR 334).

16 When presented with conflicting medical opinions, the ALJ
17 must determine credibility and resolve the conflict. *Matney v.*
18 *Sullivan*, 981 F.2d 1016, 1019 (9th Cir. 1992). "[T]he
19 Commissioner must provide clear and convincing reasons for
20 rejecting the uncontradicted opinion of an examining physician....
21 [T]he opinion of an examining doctor, even if contradicted by
22 another doctor, can only be rejected for specific and legitimate
23 reasons that are supported by substantial evidence in the record."
24 *Lester v. Chater*, 81 F.3d 821, 830-31 (9th Cir. 1995) (citations
25 and internal quotation marks omitted).

26 The ALJ provided a minimum of four reasons for rejecting Dr.
27 Bagby's conclusions regarding Plaintiff's functional limitation.
28 First, the ALJ noted that there were contradictory reports in the

1 record from treating physicians who had concluded that the
2 Plaintiff was not functionally limited and that surgical
3 intervention was not necessary. (AR 334; AR 39 citing Exhibits
4 30F, 9F, 14F and 32F). Second, the ALJ pointed out that the
5 record did not reflect that the Plaintiff had been referred to Dr
6 Bagby by any treating physician thus it was possible the exam was
7 in association with his application for benefits. Third, the ALJ
8 indicated that Dr. Bagby's recommendations were based upon
9 Plaintiff's statements of pain and functional which were
10 inconsistent with Plaintiff's presentation to other physicians and
11 were not consistent with his activities of daily living. Fourth,
12 the ALJ recognized Dr. Bagby's assessment was made without the
13 benefit of Plaintiff's medical records and thus, without
14 consideration of the conflicts in Plaintiff's reports.

15 Plaintiff does not challenge the ALJ's determination that he
16 lacked credibility. Credibility determinations do bear on the
17 evaluation of medical evidence when an ALJ is presented with
18 conflicting medical opinions. *Webb v. Barnhart*, 433 F.3d 683, 688
19 (9th Cir. 2005). Accordingly, in evaluating Dr. Bagby's opinion,
20 the ALJ properly considered the fact that Dr. Bagby's assessment
21 of Plaintiff's was based primarily upon Plaintiff's inconsistent
22 self-reporting. The Court finds the ALJ's stated reasons for
23 rejecting the Dr. Bagby's opinion were sufficiently specific and
24 legitimate and are supported by substantial evidence of record.

25 After the ALJ's decision was filed, Plaintiff returned to Dr.
26 Bagby for an examination on January 5, 2005. The Court notes that
27 the administrative transcript reflects Plaintiff's counsel sent
28 the Appeals Council Dr. Bagby's report resulting from this exam in

1 March 2005. However, it appears this medical record was not
2 considered by the Appeals Council as the list of supplemental
3 evidentiary material does not reflect inclusion of this evidence
4 as part of the record and it was not otherwise rejected in the
5 Appeals Council's decision. (AR 16). Despite this new evidence,
6 remand is unnecessary because the denial of benefits remains
7 supported by substantial evidence. In his latest report Dr. Bagby
8 opines that Plaintiff "appears to have a MARKED IMPAIRMENT AND
9 ABLE TO DO LIGHT WORK over a period of six months...He should be
10 encouraged to pursue work with the impairment rating as offered.
11 His motivation is in question." (AR 22)(emphasis in original).

12 This report was not informed by any new examinations, tests,
13 data or other information, however. The report was merely a
14 re-characterization of the same information upon which the first
15 report had been based. Given the second report was submitted after
16 the ALJ's adverse decision and is therefore less persuasive
17 than the first, *Flaten v. Sec'y of Health and Human Servs.*, 44
18 F.3d 1453, 1463 (9th Cir. 1995), and given the bases for ALJ's
19 express rejection of Dr. Bagby's opinion, there is little chance
20 that the second report would have changed the ALJ's decision.
21 This additional evidence does not provide a basis to remand this
22 case.

23 Without any citation to the record or specific mention of the
24 opinion, Plaintiff also suggests Dr. Goodwin opined physical
25 limitations greater than those determined by the ALJ. Plaintiff's
26 Memorandum, Ct. Rec. 12 at 18. However, in August 2002, Dr.
27 Goodwin opined that, "I have been very candid with the patient
28 that based on my exam today I do not find any limitations which

1 would make him eligible for GAU disability..." (AR 321).
2 Throughout Plaintiff's course of treatment, Dr. Goodwin
3 consistently rated the severity of Plaintiff's knee and chronic
4 low back pain as mild. (AR 320, 321, 538). There is no
5 evidentiary support for Plaintiff's contention that Dr. Goodwin
6 opined limitations greater than the ALJ assessed.

7 After review of the record, the Court concludes the ALJ's RFC
8 assessment is consistent with the evidence as a whole and is
9 accordingly properly supported by substantial evidence.

10 **CONCLUSION**

11 Having reviewed the record and the ALJ's conclusions, this
12 Court finds that the ALJ's decision is supported by substantial
13 evidence and free of legal error. Based on the foregoing, the
14 undersigned finds that the ALJ properly determined that Plaintiff
15 is not disabled within the meaning of the Social Security Act.
16 Accordingly,

17 **IT IS ORDERED:**

18 1. Plaintiff's Motion for Summary Judgment (**Ct. Rec.**
19 **11**) is **DENIED**.

20 2. Defendant's Motion for Summary Judgment (**Ct. Rec.**
21 **15**) is **GRANTED**.

22 3. The District Court Executive is directed to enter
23 judgment in favor of Defendant, file this Order, provide a copy to
24 counsel for Plaintiff and Defendant, and **CLOSE** this file.

25 **DATED** this 5th day of September, 2006.

26
27 s/ Alan A. McDonald
28 ALAN A. McDONALD
SENIOR UNITED STATES DISTRICT JUDGE